BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of Court Below.

(Majority and Dissenting Opinion.)

The opinion of the Supreme Court of Illinois (Rec. 249) is reported in 378 Ill. 506. (Advance sheets.)

Jurisdiction.

The jurisdiction of this Court is based upon section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925. 28 U. S. C. A. § 344(b).

The judgment of the Supreme Court of Illinois was entered November 24, 1941 and on February 6, 1942 an extension of time was granted by Mr. Associate Justice Byrnes to petitioners to and including March 24, 1942 within which to file the petition for a writ of certiorari.

A statement particularly disclosing the basis upon which petitioners contend this court has jurisdiction is set forth in the preceding petition (pp. 10-13).

Statement of the Case.

This has already been stated in the preceding petition under I (pp. 2-9) which is hereby adopted and incorporated in this brief.

Specification of Errors.

The preceding petition sufficiently specifies the errors relied on by petitioner (pp. 11-13).

Summary of the Argument.

I.

A. No jurisdiction existed in the Commission to entertain or determine the purely judicial issues on which the Supreme Court of Illinois on review predicated its decision. Such issues were not relevant to any question properly before the Commission. Determination by the court of issues not made by the record before the Commission, violates the due process requirements of the Fourteenth Amendment that the court have jurisdiction.

B. Petitioners have not been afforded an opportunity to be heard on the judicial questions of whether the Cities and Villages Act granted power of ouster to Geneseo and Heyworth and of whether, if granted, the Public Utilities Act repealed such power because the Commission, as the trial tribunal, had no jurisdiction and in fact was precluded by the decisions of the Supreme Court from exercising jurisdiction to entertain or determine these judicial questions.

II.

A. Petitioners' circuit court judgments, entered on authority of the first Geneseo case, confirmed in them the right to continue utility operations in the streets of respondents. The Supreme Court in deciding that Heyworth and Geneseo have the power to oust petitioners has thereby annulled those judgments. This has been done without jurisdiction and in an arbitrary manner.

B. Petitioners have had no opportunity to be heard or to present their defenses with respect to the validity and scope of the prior judgments in the Geneseo and Heyworth ouster suits. Those questions were not before the Commission and no evidence with respect to those prior cases

and pleadings therein and the issues formed by said pleadings was or could have been presented to the Commission or was before the Supreme Court of Illinois, which was empowered to act solely on the record made before the Commission.

Argument.

I.

The decision of the Supreme Court of Illinois directs that the Commission order petitioners to remove their electric facilities from the streets of, and to discontinue furnishing electricity in Geneseo and Heyworth. This is predicated on the holding by the court that the Cities and Villages Act granted power to Geneseo and Heyworth to oust petitioners, that the Public Utilities Act did not repeal that grant, and further, that the former ouster suits did not adjudicate that Geneseo and Heyworth had no power to oust petitioners.

We contend that these holdings were made by the court without jurisdiction and without affording petitioners an opportunity to be heard and present their defenses and so violated the rights of due process guaranteed to petitioners by the Fourteenth Amendment.

We claim that the Commission possessed no power to entertain or determine these judicial questions and that the Supreme Court had no power to inject these issues into the record made before the Commission.

The Commission is a statutory creature and possesses only those powers conferred upon it by the legislature. The jurisdiction of the Commission to entertain a complaint is found in Section 64 of the Public Utilities Act where it is provided:

> "Complaint may be made * * * by petition or complaint in writing, setting forth any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the Commission."

Up to the date of the present decision of the Supreme Court the provisions of the Public Utilities Act had been

repeatedly construed to contain no grant of power to the Commission to entertain or determine a judicial question. *Utilities Commission* v. *Okaw Valley Mut. Tel. Ass'n*, 282 Ill. 336, 340, 342; *People* v. *Peoria & Pekin Union Ry. Co.*, 273 Ill. 440, 445, 446; *Barry* v. *Commonwealth Edison Co.*, 374 Ill. 473, 477, 478: *Lowden* v. *Commerce Commission*, 376 Ill. 225, 230.

The law was also well settled in Illinois, up to the present decision, that the interpretation of statutes to determine the existence and extent of powers granted was a judicial function susceptible of performance only by the exercise of judicial power; more specifically, whether a later act of the legislature repealed an earlier one, and if so, to what extent, was a judicial question. *Merlo* v. *Big Muddy Coal & Mining Co.*, 258 Ill. 328, 334; *People* v. *Bruner*, 343 Ill. 146, 158.

The questions of whether the Cities and Villages Act granted power of ouster, of whether the Public Utilities Act repealed such grant, of whether the judgments of the former ouster suits adjudicated that Geneseo and Heyworth lacked power of ouster were in no respect implicit in or relevant to the question of convenience and necessity the Commission was called upon to decide in this case.

The provisions of the Public Utilities Act, and the powers of the Commission conferred thereby, operate exclusively upon public utilities. In this respect, the provisions of the Public Utilities Act are similar to the provisions of the Interstate Commerce Commission Act, and this Court has held that the Interstate Commerce Commission is not concerned with judicial questions, even though they relate to an administrative matter before it. *New York Central Securities Co.* v. *U. S.*, 287 U. S. 12, 26; *Claiborne-Annapolis Ferry* v. *U. S.*, 285 U. S. 382, 391; *Cleveland, C. C. & St. L. Ry. Co.* v. *U. S.*, 275 U. S. 404, 413, 414.

Typical of these last mentioned cases is the Claiborne-Annapolis Ferry case, where in answer to the contention that the certificate of convenience and necessity granted by the Interstate Commerce Commission was void because the evidence before the Commission showed that the carrier lacked corporate power to exercise the certificate, this Court said (page 391):

> "Whether the Railway Company has corporate power to operate the proposed ferry is a question which cannot be considered in this proceeding."

We contend that the provisions of the Public Utilities Act and the decisions of the Supreme Court prior to the present decision precluded the Commission from entertaining or determining the purely judicial issues decided by the court and that under this state of the law there was no opportunity afforded to petitioners, as required by due process, to be heard and present their defenses on these judicial questions to the trial tribunal, which in this case was the Commission. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 681.

When the orders of the Commission were before the Supreme Court on review the only jurisdiction the court had in the premises was that vested in it by the Public Utilities Act to ascertain and determine the reasonableness and lawfulness of the orders of the Commission on the record made before the Commission. The Supreme Court itself, subsequent to the time these cases were heard by the Commission, had held that the court in reviewing an order of the Commission cannot entertain a question that was beyond the jurisdiction of the Commission itself to entertain. In *Barry* v. *Commonwealth Edison Co., supra*, decided October 11, 1940, rehearing denied December 4, 1940, the court said (page 479):

> "It is also urged that appellant should have appealed from the order of the commission to the Circuit Court under section 68 (par. 72) of the Public Utilities

> act, but under this section the Court could not have passed upon any question beyond the jurisdiction of the commission, but was required to decide it solely upon the record certified by the commission."

It would seem to be clear that the grant of jurisdiction to the court to determine the "lawfulness" of an order of the Commission on the record made before the Commission necessarily confines the inquiry to questions properly before the Commission. Otherwise, the court could, on review, adjudicate issues on which there had been no hearing.

Petitioners appreciate the weight and finality which this Court properly accords to the interpretation by the supreme court of a state of the statutes and constitution of that state. Here, however, the Supreme Court of Illinois in construing the Cities and Villages Act, the Public Utilities Act, and the judgments in the former ouster suits violated the requirements of jurisdiction and a hearing guaranteed by the Fourteenth Amendment. We submit that the rule of law applicable here is that pronounced by Mr. Justice Reed in the recent case of *Stoll* v. *Gottlieb*, 305 U. S. 165, 171, where he stated:

> "A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators".

At the threshhold of due process of law, as guaranteed by the Fourteenth Amendment, is the question of jurisdiction, and if that does not exist, there is no due process. *Illinois Natural Gas Co.* v. *Central Ill. Pub. Serv. Co.*, 314 U. S. ....; *Twining* v. *New Jersey*, 211 U. S. 78, 111; *Andrews* v. *Andrews*, 188 U. S. 14; *Scott* v. *McNeal*, 154 U. S. 34, 46.

The due process requirement of an opportunity to be heard and to present defenses is violated where a court decides an issue outside of the record and on which, because of the limited jurisdiction of the trial tribunal, pres-

entation of evidence and consideration of the issues are prohibited. *Brinkerhoff-Faris* v. *Hill*, 281 U. S. 673, 681; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 426; *Reynolds* v. *Stockton*, 140 U. S. 254, 266, 268; *Windsor* v. *McVeigh*, 93 U. S. 274, 282.

II.

The circuit court judgments entered in the former ouster suits confirmed in petitioners valuable property rights. These judgments were entered on the authority of the first Geneseo case. An analysis of the opinion in the first Geneseo case demonstrates the scope and effect of these judgments and that the case was decided on the merits. The treatment of the case by the decision sought to be reviewed is so arbitrary and unsupportable as to deprive petitioners of substantial property rights; in other words, the Supreme Court in these proceedings annulled these judgments without jurisdiction.

At all times in question petitioners had certificates of convenience and necessity. Under these certificates rights were acquired pursuant to Section 55 of the Public Utilities Act (Ill. Rev. Stat. 1941, ch. 111⅔, § 56). This Court decided in *Frost* v. *Corporation Commission of the State of Oklahoma*, 278 U. S. 515, that a certificate of convenience and necessity constitutes a franchise granted by the state in consideration of the performance of a public service and, as such, constitutes a property right within the protection of the Fourteenth Amendment.

Petitioners were afforded no opportunity in the course of the proceedings resulting in the decision sought to be reviewed to introduce in evidence the pleadings in the former ouster suits by which the issues in those suits and the scope of the judgments entered thereon were specifically defined. By virtue of this limitation we are confined in our

analysis of the decision in the first Geneseo case to a consideration of the statements contained in the opinion in that case.

From the opinion in the first Geneseo case, it appears that the complaint alleged that the franchise ordinance of Northern had expired and that the city, by ordinance, had directed the utility to remove its equipment from the streets, and it prayed a mandatory injunction requiring such removal. The utility answered that it was operating under the Public Utilities Act within the jurisdiction of the Commission; that the Act prohibited it without the consent of the Commission from ceasing to furnish electric service, and prohibited the city from removing its facilities from the streets unless authorized by the Commission, and that the city was without legal authority to prohibit the use or occupation of the streets in the city by the utility and was without power to maintain the suit. It is clear from the opinion (Rec. 301), that the court's decision rests on the holding that the city was without legal authority to prohibit the use or occupation of the streets by the utility and that it was without power to maintain the suit. The Supreme Court had jurisdiction in the case only by reason of the fact that the validity of the ouster ordinance was involved. (Ill. Rev. Stat. 1941, ch. 110, § 199.)

In the opinion the court stated the issue to be: "Can the plaintiff maintain this action?" Geneseo claimed this power by reason of a provision of its special charter that title to the streets was vested in it.

After a general discussion of the police power, and the power of the state to withdraw rights and functions granted to municipalities, the court held that whatever title had vested in the city had been withdrawn by the legislature from the municipality for utility purposes and placed in the Commission. The court stated that since the original

installation of the utility's facilities in the streets, the city had engaged in the sale of electric energy to the public as a competitor of the utility and by the exercise of a supposed governmental function seeks to oust that equipment from the streets, "the reason assigned being that the defendant's franchise, given it by the city, has expired."

The court then puts this question: "In that situation, is the defendant a trespasser by reason of maintaining its electrical equipment on such streets and has the plaintiff, by reason of its powers, reasonably and necessarily implied by the grant to it in its special charter, the right to eject the plaintiff's equipment from such streets?"

The city sought to invoke the doctrine of estoppel against the utility, claiming it was estopped under the provisions of its franchise contract from denying the right of the city to remove the utility's property from the streets. The court held that this franchise contract, in so far as it interfered with the Commission in the exercise of the powers granted it by the Utilities Act, was abrogated by that Act; that neither party to that contract could impinge upon the powers of the Commission. The court also held that to permit a city to exercise control over the instrumentalities of a public utility would be to give it concurrent jurisdiction with the Commission, a result not contemplated by the Public Utilities Act. The court specifically stated (Rec. 305) that it had expressly held in *Chicago Motor Coach Co.* v. *City of Chicago,* 337 Ill. 200:

> "that the provisions of the Utilities act withdrew from municipalities in this State the power which they had previously exercised in relation to the use of the streets, alleys and public places by public utilities and that these powers were conferred upon the commission."

Finally the court held: "The plaintiff was without legal power and authority to maintain the proceeding."

That the court decided the issue whether the city had the power to pass the ouster ordinance and maintain the suit is made clear by the judgment of remandment with directions to overrule the motion to strike the answer. The answer raised this issue among several issues. If the court was not resting its decision on this issue, it would not have ordered it reinstated in the answer. It is conclusively shown that the case was decided on the merits and not on the question of jurisdiction of the circuit court to entertain and decide the issue, because the order of remandment directed the circuit court to exercise further jurisdiction on the merits. *Investment Company* v. *New York Central R. R. Co.,* 271 U. S. 228, 231.

If a decision is rested on two or more different grounds, any one of which is sufficient to support it, whatever is said in the opinion relevant to any one of these grounds is not dictum but is the judgment of the court. *Railroad Companies* v. *Schutte,* 103 U. S. 118, 143; *Union Pacific Co.* v. *Mason City Company,* 199 U. S. 160, 166; *Richmond* v. *United States,* 275 U. S. 331, 340.

In *City of Paris* v. *Kentucky Utilities Co.,* 280 Ky. 492, 133 S. W. (2d) 559, the court, relying upon the principle announced in *McCullough* v. *Virginia,* 172 U. S. 102, held that a judgment rendered in a prior suit determining that a utility had the right to remain in the streets, was invulnerable to attack in an ouster suit, even though subsequent to the first judgment the statute was amended eliminating the basis on which the prior judgment was rendered.

The clear, unmistakable holding of the Supreme Court in the first Geneseo case was that the city had no power to eject the utility upon the expiration of its franchise

ordinance. This holding characterizes petitioners' circuit court judgments, entered on the authority of that case, so that those judgments confirm in petitioners the right to continue operations in the municipalities through the exercise of their certificates of public convenience and necessity, subject only to the control and regulation of the Commission.

The effect of the decision sought to be reviewed is to annul petitioners' circuit court judgments. A judgment cannot be examined except in a mode provided by law. *Garrison* v. *City of New York,* 21 Wall. 196.

If petitioners' judgments had been re-examined in a mode provided by law, opportunity would have been afforded petitioners to introduce in evidence the complaints and answers which framed the issues adjudicated by their former judgments. As it was the court reached its determination with respect to these judgments merely by reference to the opinion in the first Geneseo case.

The proposition that a court may in one proceeding annul a judgment that has been entered in a different proceeding is so clearly against the law of the land that it violates the requirements of the due process clause. While the Illinois Supreme Court took the position that it was not relitigating the issue decided in the first Geneseo case and therefore was not annulling petitioners' judgments, nevertheless it will appear to this Court upon an examination of the first Geneseo case in determining the Federal questions presented here that the Supreme Court in the decision of this case has nullified those judgments.

Conclusion.

IT IS, THEREFORE, RESPECTFULLY SUBMITTED that this case is one calling for the exercise by this Court of its super-

visory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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